UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NONI BODDIE,

Plaintiff,

v.

COMCAST (CC) OF WILLOW GROVE, COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC AND COMCAST CORPORATION,

Defendants.

No. 1:21-cv-20740-NLH-SAK

OPINION

APPEARANCES:

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On behalf of Plaintiff

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On behalf of Defendants

HILLMAN, District Judge

Before the Court is Defendants' Motion to Compel Arbitration. (ECF 8). For the reasons expressed below, the Motion will be granted and this case will be stayed pending

arbitration.

I. BACKGROUND

On May 2, 2019, Plaintiff signed an offer letter for a Senior Director of Human Resources position with Comcast. (ECF 13 at 9). The letter included the following language:

> Comcast has a dispute resolution program for its employees, known as Comcast Solutions, which provides a three-step process (facilitation, mediation and binding arbitration) for resolving a variety of workplace legal issues should there be any that arise between you and the Company during or after your employment. A brochure with information and directions on how to obtain additional information related to the program is being provided to you along with this offer letter. Please review this information carefully, as the program affects the legal rights of both you and the Company (including a waiver of the right to bring a civil action in federal or state court or before a civil judge or jury, as well as a waiver of the right to bring or participate in a class action, collective action or representative action). . . . By accepting this offer of employment with the Company and signing below, you acknowledge that you understand the terms of the Comcast Solutions program and also acknowledge that both you and the Company agree to participate in and be bound by the terms of the Comcast Solutions program.

(ECF 8-5 at 4).

On May 21, 2019 and May 1, 2020, Plaintiff again acknowledged the Comcast Solutions Program, pursuant to a Code of Conduct and Employee Handbook Acknowledgement that stated as follows:

Unless I am not participating in Comcast Solutions because I (i) previously "opted out" of the program during the program roll out period, or (ii) am covered by a collective bargaining agreement or an authorized employment agreement which does not include participation in Comcast Solutions, I understand that the Comcast Solutions Program is a mutually-binding contract between Comcast and me and that my continued employment with Comcast is confirmation that I am bound by the terms of the Comcast Solutions Program. I further understand and agree that by participating in the Comcast Solutions Program, both Comcast and I waive any right to bring or participate in a case in court (on an individual, collective, representative, or class basis) or have a trial by court, judge, or jury for any Covered Claims (as that term is defined in the Comcast Solutions Program). Further information about the Comcast Solutions Program -- including the Program Guide, Frequently Asked Questions, and various Program forms (including the Initial Filing form) -- is available for me to review on ComcastNow.

. . .

By clicking "I acknowledge," I also certify that (i) I am in compliance with the Code of Conduct, (ii) I have disclosed and, if required, obtained approval, of every circumstance where disclosure and/or approval is required under the Code of Conduct, and (iii) I have reported all potential Code of Conduct violations of which I am aware. I understand and agree that if I click 'I do not acknowledge' and disclose an exception below, I am still obligated to abide by all rules, policies, and standards set forth in the Code of Conduct and Employee Handbook (and all related policies) and am still bound by the Comcast Solutions Policy."

(ECF 8-5 at 38,41). On both occasions Plaintiff clicked "I acknowledge." (ECF 13 at 10).

On December 28, 2021, Plaintiff filed her Complaint in this Court alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964, Section 1981 of the Civil Rights Act of 1866, and the New Jersey Law Against Discrimination. (ECT 1). Defendants filed a Motion to Compel Arbitration and Stay Proceedings on March 7, 2022. (ECF 8). On April 4, 2022, Plaintiff filed her response in opposition. (ECF 13). Finally, on April 25, 2022, Defendants filed their reply in support of their motion. (ECF 21).

II. LEGAL STANDARD

Depending on the circumstances, a motion to compel arbitration may apply a motion to dismiss or motion for summary judgment standard. If the face of the complaint and any documents relied on in the complaint clearly show that a party's claim is subject to an enforceable arbitration clause, the Court will use a "Rule 12(b)(6) standard without discovery's delay." Guidotti v. Legal Helpers Debt Resolution, L.L.C., 716 F.3d 764, 777 (3d Cir. 2013) (internal citation omitted). The motion to dismiss standard is inappropriate, however, where "the motion to compel arbitration does not have as its predicate a complaint with the requisite clarity to establish on its face that the parties agreed to arbitrate." Id. at 774 (internal quotation

omitted). In this situation, courts must "use the summary judgment standard under Rule 56(a), in which 'the motion [to compel] should be granted where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Seme v. Gibbons, P.C., No. 19-857, 2019 WL 2615751 at *2 (quoting Maddy v. Gen. Elec. Co., 629 F. App'x 437, 440 (3d Cir. 2015)). Here, the summary judgment standard is appropriate where the complaint does not refer to the arbitration agreement, but rather defendants attach documents in support of their motion to compel.

Summary judgment is appropriate where the Court is satisfied that the materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, or interrogatory answers, demonstrate that there is no genuine issue as to any material fact and that given the undisputed facts the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Fed. R. Civ. P. 56(a).

A dispute about a material fact is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" if, under the governing substantive law, a disputed fact may affect the

outcome of the suit. Id. In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence. Id. at 255. Instead, the non-moving party's evidence "is to be believed and all justifiable inferences are to be drawn in his favor." Id.

Initially, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Once the moving party has met this burden, the burden shifts and the nonmoving party must identify specific facts showing that there is a genuine issue for trial. Id. To withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict those offered by the moving party. Anderson, 477 U.S. at 256-57. A party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. Saldana v. Kmart Corp., 260 F.3d 228, 232 (3d Cir. 2001).

In deciding a motion to compel arbitration, the Court must ask (1) whether the parties entered into a valid arbitration agreement and (2) whether the dispute at issue falls within the scope of the arbitration agreement. Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513, 523 (3d Cir. 2009). If there is a valid arbitration agreement and the

dispute is covered by the arbitration agreement, the Federal Arbitration Act requires the court to enforce the arbitration agreement. Federal Arbitration Act, 9 U.S.C. § 4. The party seeking to avoid arbitration bears the burden of demonstrating that arbitration should not be compelled. Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 92 (2000). "It is well established that the Federal Arbitration Act (FAA) reflects a 'strong federal policy in favor of the resolution of disputes through arbitration.'" Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160 (3d Cir. 2009) (quoting Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 263 (3d Cir. 2003)).

III. DISCUSSION

A. Subject Matter Jurisdiction

This Court has jurisdiction over Plaintiff's federal claims under 28 U.S.C. § 1331 and Plaintiff's New Jersey Law Against Discrimination claims under 28 U.S.C. § 1367.

B. Delegation of Issue of Arbitrability

Defendants argue that "the parties delegated the issue of arbitrability, or whether a dispute falls within the scope of the arbitration provision, to the arbitrator in the first instance." (ECF 8-1 at 20). Plaintiff expands that "the Program . . . makes clear that '[a]ny issue concerning arbitrability of a particular issue or claim pursuant to the arbitration agreement (***except for those concerning the validity***

or enforceability of the Waiver) shall be resolved by the Arbitrator, not Court.'" (ECF 13 at 12 (quoting the arbitration agreement Exhibit C to Motion to Compel) (alteration and emphasis in original)). On the other hand, "[a]ny issue concerning the validity or enforceability of the waiver in this section ("Waiver") ***shall be decided by a court of competent jurisdiction, and the arbitrator shall not have any authority to considerer or decide any issue concerning the validity or enforceability of the Waiver.***" (Id. (alteration and emphasis in original)). Plaintiffs conclude that "because Plaintiff is explicitly challenging the validity and enforceability of the waiver by arguing that the Program is unconscionable, this Court, and not an arbitrator, should decide the issue of arbitrability." (Id. at 12).

Based on the plain language of the Agreement and the representations of all parties, we will analyze only whether there is a valid arbitration agreement, not whether the present issue falls within the scope of the agreement.

C. Validity of Arbitration Agreement

Plaintiff argues that the Arbitration Agreement is "invalid and unenforceable because it is unconscionable." (ECF 13 at 13). Defendants respond that the Agreement is valid and enforceable. (ECF 21 at 6).

Courts "look to applicable state law to determine whether

the parties agreed to arbitrate." Ailments Krispy Kernels, Inc. v. Nichols Farms, 851 F.3d 283, 289 (3d Cir. 2017). In New Jersey,[1] "[a]n enforceable agreement requires mutual assent, a meeting of the minds based on a common understanding of the contract terms." Id. (quoting Morgan v. Sanford Brown Inst., 137 A.3d 1168, 1180 (N.J. 2016) (alteration in original)).

"The unconscionability determination requires evaluation of both procedure and substance." Rodriguez v. Raymours Furniture Co., 138 A.3d 528, 541 (N.J. 2016). New Jersey courts apply "a sliding-scale approach to determine overall unconscionability, considering the relative levels of both procedural and substantive unconscionability." Delta Funding Corp. v. Harris, 912 A.2d 104, 111 (N.J. 2006). Here, Plaintiff asserts that "the Program is both procedurally and substantively unconscionable." (ECF 13 at 13).

i. Procedural Unconscionability

Plaintiff argues that the Agreement is procedurally unconscionable because it is a "contract of adhesion." (ECF 13 at 15).

[1] The parties have not raised any question as to choice of law. Both Plaintiff and Defendants rely on New Jersey law in their briefing, and thus seem to represent that New Jersey law applies. We note that all of the parties listed in the complaint are listed with New Jersey addresses and that Comcast has substantial operations in New Jersey. Therefore, we will apply New Jersey law in resolving this motion.

New Jersey courts have held that a finding that a contract is a contract of adhesion does not necessarily, on its own, serve as proof of unconscionability. Delta Funding Corp., 912 A.2d at 111. Instead, identifying an agreement as a contract of adhesion represents "the beginning, not the end, of the inquiry into whether a contract, or any specific term therein, should be deemed unenforceable." Uddin v. Sears, Roebuck & Co., et al., No. 13-6504, 2014 WL 1310292, at *7 (quoting Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A.2d 88, 96 (N.J. 2006)).

Rather than simply declaring all contracts of adhesion procedurally unconscionable, the New Jersey Supreme Court has held that the defense of unconscionability "calls for a fact-sensitive analysis in each case, even when a contract of adhesion is involved." Delta Funding Corp., 189 N.J. at 39. New Jersey courts specifically require analysis of four factors: "(1) the subject matter of the contract, (2) the parties' relative bargaining positions, (3) the degree of economic compulsion motivating the 'adhering' party, and (4) the public interests affected by the contract." Uddin, 2014 WL 1310292, at *7 (quoting Muhammad, 912 A.2d at 97). If a plaintiff fails to adequately show that a contract of adhesion was unfairly signed according to these factors, the plaintiff has failed to prove procedural unconscionability. Id. In analyzing these factors we note that the New Jersey Supreme Court has explained that

"[v]irtually every court that has considered the adhesive effect of arbitration provisions in employment applications or employment agreements has upheld the arbitration provision contained therein despite potentially unequal bargaining power between employer and employee." Martindale v. Sandvik, Inc., 800 A.2d 872 (N.J. 2002). In addition, "the economic coercion of obtaining or keeping a job, without more, is insufficient to overcome an agreement to arbitrate statutory claims." Quigley v. KPMG Peat Marwick, LLP, 749 A.2d 405, 412 (N.J. Super. App. Div. 2000).

There does not appear to be any true dispute here that the Contract was a contract of adhesion. First, agreement to the Comcast Solutions Program was a requirement of accepting the job offer. (ECF 13 at 9). Second, the Acknowledgement Forms Plaintiff was presented with to reaffirm agreement were standardized forms that gave Plaintiff no choice but to agree to their terms. Regardless of whether she clicked "I acknowledge" or "I do not acknowledge," she would remain bound by the terms of Comcast Solutions Program. (Id. at 10). Consequently, the only way Plaintiff could have avoided the terms of Comcast Solutions was by quitting her job. (Id.). Such a contract has many of the attributes of a contract of adhesion. However, as set out above, such a finding would not require the Court to hold the arbitration agreement procedurally unconscionable

unless Plaintiff has sufficiently demonstrated that the contract was unfair under the factors outlined by the New Jersey courts.

Plaintiff does not engage in a discussion of the factors set out above, but instead points to an opinion in this district analyzing the same Arbitration Agreement, in which Judge Kugler stated: "Because Plaintiff was forced to accept the terms of Comcast Solutions or quit his job, the Court is willing to assume that he has made a strong showing of procedural unconscionability." Hubbard v. Comcast Corp., No. 18-16090, 2020 WL 4188127, at *7 (D.N.J. July 21, 2020). The Court went on to say that "[n]evertheless, Plaintiff is unable to show that the terms of Comcast Solutions are substantively unconscionable." Id. Plaintiff cites this as proof that the Agreement is procedurally unconscionable.

As noted above, unconscionability is a fact-specific analysis. In addition, Plaintiff has the burden of proving unconscionability. Montgomery v. Bristol-Myers Squibb Co., No. 19-19948, 2020 WL 3169373, at *3 (D.N.J. June 15, 2020). Plaintiff has not set forth the specific facts of surrounding her entering into the Arbitration Agreement. On the other hand, Defendants point out that Plaintiff is a "seasoned HR professional" and that she was aware of the Arbitration Agreement at the time she accepted her employment offer. (ECF 21 at 10). Because Plaintiff has not pointed to specific

factors demonstrating that her arbitration agreement was entered into under unfair or unconscionable circumstances, we will not hold that the agreement was procedurally unconscionable.

ii. Substantive Unconscionability

"New Jersey courts may find a contract term substantively unconscionable if it is 'excessively disproportionate' and involves an 'exchange of obligations so one-sided as to shock the court's conscience.'" Agrabright v. Rheem Mfg. Co., 258 F. Supp. 3d 470, 481 (D.N.J. 2017) (quoting Delta Funding Corp., 912 A.2d at 120).

Plaintiff alleges that the Arbitration Agreement does not provide for a fair forum. She explains that pursuant to the agreement, she would be required to arbitrate her claims with an alternative dispute resolution services organization called JAMS. (ECF 13 at 16). Plaintiff alleges that this is not a fair forum to adjudicate her race discrimination claims because 88% of all JAMS arbitrators are white, and more specifically only one of the eleven JAMS arbitrators in the Philadelphia region that handles employment matters is black. (Id.).

Plaintiff attempts to rely on Batson v. Kentucky in support of her argument that arbitration is an unfair forum. She compares the lack of black arbitrators to "excluding 'jurors' based on race." (ECF 13 at 19). Plaintiff does not point to any caselaw that makes this connection, but instead refers to a

law review article in support of this novel argument. (ECF 13 R 19).

The Supreme Court has rejected arguments of an unfair or biased arbitration forum, stating, "[w]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346, 3357-58, 87 L. Ed. 2d 444 (1985) (alteration in original)). In Glimer, the Supreme Court noted arbitration rules that would protect against bias. Id. Defendants point to similar protections here, pointing to the JAMS rule that states that arbitrators must "promptly disclose any circumstance likely, based on information disclosed in the application, to affect the Arbitrator's ability to be impartial or independent." (ECF 21 at 14).

Moreover, the Supreme Court has noted that, "[t]he FAA also protects against bias, by providing that courts may overturn arbitration decisions '[w]here there was evident partiality or corruption in the arbitrators.' 9 U.S.C. § 10(b)." Gilmer, 500 U.S. at 30-31. Plaintiff's assertion that the arbitration agreement is substantively unconscionable due to bias does not have legal support. See Falk v. Aetna Life Ins. Co., No. 19-

00434, 2019 WL 4143882, at *6 (D.N.J. Aug. 31, 2019); Hubbard v. Comcast Corp., No. 18-16090, 2020 WL 4188127, at *8 (D.N.J. July 21, 2020).

D. Public Policy

Plaintiff reiterates her substantive unconscionability arguments in asserting that the arbitration agreement is void as against public policy. Again, Plaintiff cites to Batson and its progeny in support of her argument that arbitration here violates public policy. (ECF 13 at 20). Plaintiff does not cite to any caselaw that analogizes jurors in Batson to a whether a pool of arbitrators is diverse. The Seventh Circuit has specifically refused to extend Batson to arbitration. Smith v. Am. Arb. Ass'n, Inc., 233 F.3d 502, 507 (7th Cir. 2000). The Seventh Circuit explained that arbitration is triggered pursuant to private contracts. As such there is not state action implicating the equal protection clause. The Court explained that "[t]he fact that the courts enforce these contracts, just as they enforce other contracts, does not convert the contracts into state or federal action and so bring the equal protection clause into play." Id. While Seventh Circuit precedent is not controlling, this Court similarly declines to extend Batson to the arbitration context. Plaintiff's argument that Batson undermines her arbitration agreement does not have legal support.

E. Discovery on Arbitration Agreement's Validity

The parties may be entitled to limited discovery on the question of arbitrability "if the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue." Guidotti v. Legal Helpers Debt Resol., L.L.C., 716 F.3d 764, 776 (3d Cir. 2013)

Plaintiff has not described what discovery is needed nor has she pointed to any material issues of fact relating to the question of validity of the arbitration agreement. Further, Plaintiff has not put forward any legally cognizable argument sufficient to undermine the motion to compel. Thus, there is no factual issue here warranting limited arbitrability discovery.

IV. CONCLUSION

For the reasons expressed above, Defendants' Motion will be GRANTED and proceedings in this case are STAYED pending the results of arbitration.

An appropriate Order will be entered.

Date: February 22, 2023
At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.